

***United States Court of Appeals  
for the Second Circuit***



**PETITION FOR  
REHEARING**



75-7546

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**United States Court of Appeals**  
FOR THE SECOND CIRCUIT

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OSCAR GRUSS,

*Plaintiff-Appellee,*

—and—

OSCAR GRUSS & SON,

*Plaintiff,*

—against—

THE CURTIS PUBLISHING COMPANY,

*Defendant-Appellant.*

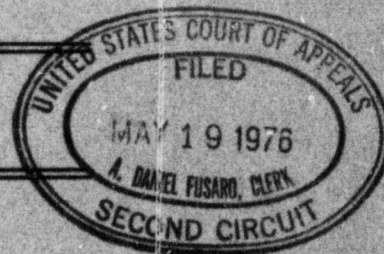
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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF NEW YORK

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**PETITION FOR REHEARING**

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Plaintiff-Appellee, Oscar Gruss ("Gruss") respectfully petitions this court for a rehearing of its decision of April 21, 1976 in the above entitled case, on the following grounds:

1. Its decision rests upon issues under state law which were not raised by the parties or the district court and, therefore, were not briefed or argued;

2. Because they were not briefed or argued, this court overlooked (a) stipulations and concessions made at the trial which preclude the resolution of such issues made by this court, and (b) certain portions of the applicable state statute which indicate that this court's interpretation thereof was erroneous; and

3. This court may have overlooked a Supreme Court decision, and other applicable case law, requiring it to consider the grounds for relief based upon state law alleged by Gruss, even though the district court had rejected such grounds and Gruss did not file an appeal.

#### STATEMENT OF THE CASE

Defendant The Curtis Publishing Company ("Curtis"), a Pennsylvania Corporation, effected a recapitalization on September 14, 1972 which gave rise to dissenting shareholders' rights of appraisal under the Pennsylvania Corporation Law (the "PCL"). Curtis refused to recognize plaintiffs' rights of appraisal, claiming that the initial objection to the plan of recapitalization was signed by the beneficial owner of the Curtis stock, Gruss, rather than by the registered owner, plaintiff Oscar Gruss & Son ("Gruss & Son"). As noted by this court, however, Curtis was fully aware of who the registered owner was because the objection was

on the letterhead of Gruss & Son and, moreover, the objection stated that Gruss & Son was the registered owner. Since the plaintiffs could not predict with certainty whether Pennsylvania courts would uphold Curtis' hypertechnical grounds for refusing to recognize their appraisal rights, plaintiffs commenced the instant action in federal court alleging that either (1) Curtis wrongfully refused to recognize Gruss' appraisal rights or (2) if such refusal was not wrongful, Gruss lost his appraisal rights by reason of misleading proxy material issued by Curtis which described the procedure for obtaining appraisal rights without distinguishing between registered and beneficial shareholders.

A brief examination of the complaint reveals that the two grounds for relief were pleaded alternatively and as mutually exclusive. The proxy violation is alleged only upon the hypothetical that Gruss had not properly exercised his appraisal right as contended by Curtis. See paragraph 19 of the Complaint \*(R10a). The relief demanded was expressly stated to be in the alternative, i.e., judgment for the damages alleged in paragraph 20 of the allegations pertaining to the proxy violation or, in the alternative, granting plaintiff the fair value of their shares which plaintiffs alleged (in paragraphs 25 and 26 of the complaint) they were entitled to if Curtis had wrongfully refused to recognize their appraisal rights (R12a).

#### The Decision Of This Court

This court held that Gruss "failed to show that he was in fact deprived of the appraisal rights accorded by the Pennsylvania Business Corporation Law," despite the "hypertechnical" stand taken by Curtis (Slip Op. 3327), and predicted that a Pennsylvania court would have sustained Gruss' right to an appraisal (Slip Op. 3328). Accordingly, this court rejected one of the two mutually

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\*"R" refers to the Joint Appendix.



exclusive grounds for relief alleged by the plaintiffs, i.e., the hypothetically alleged proxy violation.

Although this court's rejection of the proxy violation allegations was based upon its belief that Gruss had not been precluded from his appraisal rights, it did not grant relief based upon the alternative grounds alleged, i.e., that Curtis wrongfully refused to recognize those appraisal rights. Instead this court dismissed the complaint entirely. The only explanation given in the opinion for not granting relief on the alternative grounds was, as follows:

"Without discussion the judge [in the district court] found Curtis was entitled to judgment on the pendent claim -- doubtless a correct conclusion since Mr. Gruss' right to an appraisal had become time barred." (Slip Op. 3326).

Since neither the district court nor any of the parties had previously raised an issue as to whether or not Gruss' appraisal rights had become time barred, this court's statement that the appraisal rights had become time barred was made without the benefit of briefs or arguments from the parties on the issue. Because of this, this court was not advised that concessions and stipulations made at the trial preclude a finding that the appraisal rights had become time barred, and that sections of the appraisal statute indicate that the time limitations stated therein are not applicable in the instant action.

The brief reference in the opinion to the alternate state grounds also indicates that this court misunderstood the basis for the district court's rejection of those grounds. Contrary to this court's statement, the district court did discuss its reasons for finding that "Curtis was entitled to judgment on the pendent claim". The district court had found

that Gruss would not prevail in an appraisal proceeding because the initial objection had been made by the beneficial owner. Accordingly, the district court held that Curtis was liable upon the proxy violation grounds alleged and not on the mutually exclusive state grounds. In expressly discussing the dismissal of the state grounds, the district court stated:

"Second claim - plaintiffs, as previously noted, failed to comply with the Pennsylvania statute aforementioned because the objection was not executed by the holder of record. Defendant is entitled to judgment on the second cause of action pleaded." (R285a)

In view of the foregoing, it is seen that the district court dismissed the state grounds only because it had found for Gruss on the mutually exclusive federal grounds. Nothing in the prior proceedings lends support to this court's rejection of the state grounds in the face of its finding that Gruss did not lose his appraisal rights by reason of his "hypertechnical" error.

#### ARGUMENT

It is respectfully submitted that this court's reversal of the judgment below, and dismissal of the entire complaint, was erroneous because it overlooked (1) that the alternative state grounds support the district court's judgment if, as this court found, it has not been shown that Gruss had been deprived of his appraisal rights, (2) stipulations, concessions and portions of the appraisal statute which are inconsistent with a finding that Gruss' appraisal rights had become time barred, and (3) law established by the United States Supreme Court, and adhered to recently by this circuit, that a cross appeal is not required for a consideration of state claims, which are pendent to and seek the identical relief as federal claims, when the district court rejected the state claims and based its judgment upon the federal claims.



### POINT I

IN DECIDING THAT GRUSS' APPRAISAL RIGHTS HAD BECOME TIME BARRED, THIS COURT APPARENTLY OVERLOOKED STIPULATIONS AND CONCESSIONS TO THE CONTRARY, AS WELL AS SECTIONS OF THE APPRAISAL STATUTE INDICATING THAT THE TIME REQUIREMENTS THEREIN FOR COMMENCING AN APPRAISAL PROCEEDING ARE NOT APPLICABLE WHEN, AS IN THE INSTANT ACTION, THE EXISTENCE OF APPRAISAL RIGHTS IS IN ISSUE RATHER THAN JUST THE VALUE OF THE SHARFS.

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In all of the prior proceedings, the only issues raised, with respect to whether Gruss was entitled to appraisal rights, were (1) whether the initial objection to the plan was fatally defective because it was from the beneficial owner rather than the registered owner, and (2) whether plaintiffs had waived their rights to appraisal by voting for the plan with an earlier proxy. Not only was there never any contention that the plaintiffs had failed to comply with the appraisal statute by not commencing an appraisal proceeding within the time specified in PCL §515F, but, at the trial, Curtis conceded and stipulated that, other than with respect to the two issues mentioned above, there were no issues as to plaintiffs' compliance with the appraisal statute and compliance was to be deemed. (R98a-104a). This court's conclusion that Gruss' appraisal rights were time barred, apparently because he did not commence an appraisal proceeding within the time specified in PCL §515F, is contrary to the concessions and stipulations that the statute was to be deemed complied with.

The concessions and stipulations are particularly persuasive because they were made when plaintiffs were attempting to introduce evidence of compliance with the appraisal statute, other than with respect to the two issues referred to above, and the concessions and stipulations were granted in lieu of the introduction of such evidence. Specifically, the

plaintiff was attempting to introduce into evidence a letter from Curtis' counsel which rejected plaintiff's demand for the value of his shares, and thereby provided evidence that there was a timely demand upon the corporation for the fair value of the shares, when the district court interrupted the plaintiff and obtained a clarification of the issues to show that such evidence was not relevant. The court stated:

"As I understand it, the issues that are being litigated here are: first, that the demand which is contained originally in exhibit number 1...was ineffectual because...not made by the shareholder of record. Furthermore, plaintiff is not entitled to prevail because on or about September 13, according to Exhibit A, he ostensibly voted in favor of the reorganization." (R103a-104a).

Curtis' attorney then conceded that these were the issues, as follows:

"That is correct, your Honor." (R104a)

The concessions that there were no other issues as to Gruss' appraisal rights, and the stipulation that the appraisal statute was otherwise deemed complied with, were again stated as follows:

The Court: "Everything else being equal, if those two issues were resolved against the defendant, he would have done all he had to do."

Curtis' Counsel: "At that particular moment, yes, as far as the issues were limited here."

The Court: "Yes."

Plaintiff's Counsel: "If counsel would so stipulate to that."

The Court: "He is conceding it on the record. You don't need to concern yourself with it any further." (R104a)



Curtis' attorney had already conceded that there was no issue as to Gruss' compliance with the appraisal statute subsequent to Curtis' rejection of plaintiff's demand for fair value. In objecting to the introduction into evidence of the rejection letter, Curtis' counsel had stated:

"I also object on the ground of materiality. This particular letter deals with the controversy as it existed subsequent to the point of time which is in issue in this particular case." (R99a)

"...I am also objecting to the correspondence that went on subsequent to the rejection of the stock. The appraisal is not at issue in this particular case and really doesn't bear on it." (R100a)

The concessions and stipulations are further evidenced by the fact that Curtis did not raise any issue with respect to compliance with the appraisal statute on this appeal, except as to the initial objection having been signed by the beneficial owner.

In view of the foregoing, it is inconceivable that Curtis should be permitted to prevail upon the grounds that plaintiff failed to comply with the appraisal statute in any manner other than with respect to whether the initial objection was from the registered or beneficial owner and whether plaintiffs had previously voted in favor of the plan. It is respectfully submitted that this court was unaware of the concessions and stipulations with respect to the issues in this case when it stated that plaintiffs' appraisal rights "apparently had become time barred".

It is also respectfully submitted that this court overlooked sections of the appraisal statute which show that a shareholder's remedies for a wrongful failure to recognize his appraisal rights are not limited to the appraisal proceedings specified in PCL 515F and, therefore, need not be sought in the time specified therein. Subsection C of PCL 515 states that a shareholder's status as a dissenting shareholder under the statute ceases, inter alia:

"if a court of competent jurisdiction shall determine that such shareholder is not entitled to the relief provided by this section".

Thus, the statute expressly envisions that situations might arise in which the existence of a shareholder's appraisal rights are in question, rather than merely the value of his shares, and states that, under such circumstances, any court of competent jurisdiction shall make the determination as to the existence of the appraisal rights. Unlike subsection F of PCL 515, which applies when "a dissenting shareholder is unable to agree with the corporation on the fair value of his shares", subsection C does not limit the shareholder's forum to a particular court of Common Pleas. Therefore, the conclusion that the procedure set forth in subsection F does not apply



to a determination as to the existence of appraisal rights, as envisioned under subsection C, is inescapable. Since Curtis' refusal to recognize Gruss' appraisal rights pertains to the issue of whether such rights existed at all, a mere valuation proceeding was not involved. Therefore subsection F, along with its time limitations, was not applicable. As envisioned in subsection C, Gruss raised the issue as to the existence of his appraisal rights in a court of competent jurisdiction, i.e., the United States District Court based upon the principles of diversity and pendent jurisdiction, and nothing in the appraisal statute has time-barred or otherwise precluded him from doing so.

This court's reliance upon a provision in subsection H of PCL 515, that "if no offer was made, the court...may award to any shareholder who is a party to the proceeding" costs of his experts, in support of its contention that subsection F applies even when the corporation challenges the existence of appraisal rights (see F.N. 8, Slip Op. 3328), is misplaced. Subsection F makes it necessary to join all dissenting shareholders as parties in an appraisal proceeding. If one dissenting shareholder has been given an offer, he may be "unable to agree with the corporation on the fair value of his shares" and may commence an appraisal proceeding, pursuant to subsection F, joining all other dissenting shareholders. Some or all of the other dissenting shareholders may have received no offer from the corporation and, thus, may be entitled to expert witnesses costs pursuant to subsection H. Such a party who has not received an offer, however, is not the party who commenced the appraisal proceedings, he is not the party who was "unable to agree with the corporation on the fair value of his

shares" within the meaning of subsection F. In this case, where Gruss has not only received no offer, but where the existence of his appraisal rights are at issue, the shareholder is not required to bring a proceeding to determine the value of his shares, as envisioned in subsection F, within the time limits stated therein.

It should be noted that others have concluded that the appraisal proceedings under the statute, together with its time limitations, are not applicable when, as in the instant action, the corporation has refused to recognize the existence of appraisal rights. In the treatise on Pennsylvania business corporations, 2 W. Sell, Pennsylvania Business Corporations p. 11, §515.7, the appraisal proceeding set forth in PCL 515F is described only in conjunction with a prior offer from the corporation pursuant to subsection D, as follows:

"§515.7 PROCEDURE WHERE FAIR VALUE NOT AGREED UPON

When the corporation, pursuant to subsection D, makes a written offer to the dissenting shareholder, stating what it considers the "fair value" of the shares, the shareholder may accept the offer or he may reject it on the ground the fair value set by the corporation is inadequate. In the event he disagrees, he may, under subsection F, demand proceedings to value his shares at any time after sixty days and within ninety days after the date on which the plan became effective."

Since the author of the treatise refers to a shareholder's disagreement with the corporation as to the value of his shares, only immediately after a reference to the offer which is to be made by the corporation pursuant to subsection D, it appears that he is of the opinion that an offer by the corporation is a prerequisite to disagreement required to commence appraisal proceedings. Similarly, the lower court also interpreted the appraisal statute as applicable only when the existence of appraisal



rights was not at issue. In its opinion denying a motion by defendant to dismiss, the lower court stated:

"Plaintiff is not yet 'Unable to agree... on the fair value of the shares', within the meaning of §515F of the Pennsylvania BCL" (R25a).

In view of the above, it is seen that plaintiffs' construction of the appraisal statute is in accordance with other sections of the statute as well as other legal authority.

Even if it is assumed, arguendo, that subsection F of the statute was applicable, a failure to commence proceedings in the time set forth therein would not necessarily create a time bar. Subsection B of the statute states that a shareholder who does not make a timely written objection and demand for the fair value of his shares "shall be conclusively presumed to have consented to the plan and shall be bound by the terms thereof". There is no similar provision, however, to the effect that a shareholder failing to commence appraisal proceedings within the time set forth in subdivision F has conclusively waived his rights to do so. Since the statute expresses specific situations in which a shareholder loses his rights for failure to comply strictly therewith, it is a fair conclusion that a shareholder does not lose his right for failure to comply in other respects, e.g. the time limitations for commencing an appraisal proceeding under subsection F.

#### POINT II

CURTIS' LIABILITY TO GRUSS, FOR WRONGFULLY REFUSING TO RECOGNIZE HIS APPRAISAL RIGHTS, PROVIDES ALTERNATIVE GROUNDS FOR SUPPORTING THE JUDGMENT IN THE DISTRICT COURT AND, ACCORDINGLY, THIS COURT WAS REQUIRED TO CONSIDER SUCH GROUNDS EVEN THOUGH NO APPEAL WAS TAKEN BY GRUSS FROM THE DISTRICT COURT'S REJECTION THEREOF.

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This court's refusal to affirm the judgment, upon the alternative grounds that Curtis wrongfully failed to recognize Grusa's appraisal rights, cannot be justified by the fact that only Curtis filed a notice of appeal and Gruss did not. For purposes of determining the scope of an appeal, the allegations that Curtis wrongfully refused to recognize plaintiff's appraisal rights, as well as the allegations that Curtis violated the proxy rules, are both considered grounds for supporting the judgment. Therefore, notwithstanding the district court's rejection of the state law grounds, those grounds should have been considered upon Curtis' appeal. Anderson v. Atherton, 302 U.S. 643, 58 S. Ct. 53, 82 L. ed. 500 (1937); United States v. American Ry. Express Co., 265 U.S. 425, 44 S. Ct. 560, 68 L. ed. 1087 (1924); Dandridge v. Williams, 397 U.S. 471, 90 S. Ct. 1153, 25 L. ed. 2d 491; United Optical Workers Union v. Sterling Optical Company, Inc., 500 F. 2d 220 (2nd Cir. 1974).

In the United Optical Workers Union case, this circuit distinctly set forth the rule, as pronounced by the Supreme Court in the landmark American Ry. Express Co. case, as follows:

"Of course it would have been proper for [the appellee who did not file a notice of appeal] to advance any matter in the record in support of the district court's order, including arguments previously rejected by the district court, United States v. American Ry. Express Co., 265 U.S. 425, 435, 44 S. Ct. 560, 68 L. ed. 1087 (1924), 9 J.W. Moore, Federal Practice ¶204.11[3] at 934-935 (2nd ed. 1973), but it may not attempt to enlarge the relief granted by the lower court or lessen the rights of [the appellant]." (500 F. 2d at 224)

The application of this rule to a case, such as the instant one, where the plaintiff seeks recovery for a single loss, charging breach of a duty imposed both by federal statute and by state law, was clearly



established by the Supreme Court in the Anderson case, supra. In that case, plaintiff sought recovery for a loss claiming that the defendant had violated the Federal Banking Act and had also acted with common law negligence. The district court awarded recovery to the plaintiff upon the claim that the Federal Banking Act had been violated, but pointedly denied recovery upon the negligence claim. The Sixth Circuit held that the defendants were not liable under the federal statute and that plaintiff could not argue that the defendants were liable under the negligence claim because he had not appealed. In support of its holding that the federal and state claims could not be both considered under the single appeal as simply different grounds for supporting the same judgment, the Sixth Circuit carefully showed that they were technically two distinct causes of action. The Supreme Court reversed, per curiam, citing United States v. American Ry. Express Co., supra and held that no appeal by the appellee was required for a consideration of the state law claim rejected by the district court. For purposes of determining the scope of an appeal, the Supreme Court deemed both the federal claim and the state claim two theories for recovery on but a single loss.

In the instant action, despite language in the district court's opinion that Curtis "is entitled to judgment on the second cause of action pleaded", there is but a single judgment. That judgment, which was settled as directed in the opinion and signed by the court, simply awards damages to Gruss for the single loss alleged in the complaint, without reference to any "cause of action" pleaded. Moreover, although the district court held that Curtis' liability was based upon the alleged violation of the proxy rules, the amount of the judgment was determined by and precisely the same as what the court would have awarded had it instead found for the

plaintiff on the alternative state ground as Gruss now urges this court to do <sup>(R272a)</sup> ~~(R15)~~. Thus, in seeking to have this court sustain the judgment upon the state grounds, in lieu of the federal grounds adopted by the district court, Gruss is simply advancing a matter in the record without in any way attempting to enlarge the relief granted by the district court or lessen the rights of Curtis.

The instant action presents an even stronger case than does Anderson, supra, for consideration upon appellant's appeal of the state grounds rejected by the district court. In the instant action, the plaintiff has pleaded the federal grounds and the state grounds as alternate and mutually exclusive grounds for recovery. The plaintiff has not asked for judgment on both grounds, so that he may be considered at least partially aggrieved in not obtaining recovery on both, but he has asked for and received recovery on only one ground or the other. Indeed, a cross appeal by Gruss may have been improper in that it may have been deemed a concession by him that the alleged federal grounds are invalid since he would be appealing for a finding that the mutually inconsistent state grounds are valid. Therefore, if an appeal by the appellee was unnecessary for a consideration of the state grounds in the Anderson case, where the district court could have decided that the plaintiff prevailed on both the state and federal grounds, a fortiori an appeal by Gruss is unnecessary for consideration of the state grounds in the instant action where only one of the two grounds could have been sustained. Here, Gruss asked the district court to pick one of the two grounds and the district court did so. He has nothing to appeal from.

Finally, to sustain the judgment on the basis of the state grounds, this court does not even have to consider the second count of the complaint, i.e.,



the count the district court was referring to when it stated that Curtis was entitled to judgment thereon. All the allegations of the state grounds are also contained in the first count of the complaint which alleges the hypothetical proxy violation sustained by the district court. Thus, even in the most technical sense, the state ground is an alternative theory for supporting the first count, which should have been considered by this court on Curtis' appeal from the judgment against it based on that count.

CONCLUSION

It is respectfully submitted that this court erroneously overlooked the alternative state grounds for recovery when it rejected Gruss' contention that Curtis was liable for violations of the proxy rules. The state grounds should have been considered upon the appeal taken by Curtis, and this court's conclusion that Gruss' appraisal rights had been time barred is erroneous and contrary to prior stipulations and concessions. Because the issues involved in this court's treatment of the state grounds had not previously been raised, they had not been briefed or argued by the parties. In order to permit Gruss to advise this court of its errors with respect to the issues, and thereby correct a manifest injustice to him, it is respectfully requested that his petition be granted.

Respectfully submitted,

KASS, GOODKIND, WECHSLER & GERSTEIN

By Michael P. Fuchs  
A Member of the Firm

OF COUNSEL:

DAVID M. GERSTEIN  
MICHAEL P. FUCHS

MATTHEWS Evans v. Calmar

STATE OF NEW YORK )  
                              : SS.  
COUNTY OF NEW YORK )

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 14 day of May 1976 deponent served the within Petition upon:

Fuller, Lawton & Moyles, Esqs.

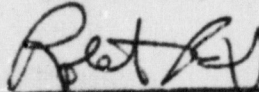
attorney(s) for

Appellee

in this action, at

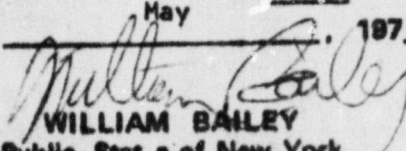
17 ~~Baxx~~ Battery Pl., NYC 10004

the address(es) designated by said attorney(s) for that purpose by depositing 3 true copies of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States post office department within the State of New York.



Robert Bailey

Sworn to before me, this 14  
day of May, 1976



WILLIAM BAILEY  
Notary Public, State of New York  
No. 43-0132945

Qualified in Richmond County  
Commission Expires March 30, 1977



Two (2) copies of the within PETITION for REHEARING  
of three (3) copies of the within PETITION for REHEARING  
is admitted this 19<sup>th</sup> day of May 1976

Vogel Marks & Rosenberg by Mr. Hertzman  
DEPENDANT - APPELLANT